84-375

No.

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE

JACK M. LEVIN,

Attorney-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

WILLIAM J. HARTE
WILLIAM J. HARTE, LTD.
111 West Washington Street
Suite 2025
Chicago, Illinois 60602
(312) 726-5015

Attorney for Petitioner

Photex — 444 North Wabash Avenue — Chicago 60611 — 321-0223

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner is denied due process and equal protection of the laws upon the imposition of a disciplinary sanction which is:

a) inconsistent with the sanctions imposed upon attorneys similarly situated and,

b) in complete disregard of the findings of fact and recommendations of the Hearing and Review Boards without clear and convincing evidence of dishonesty, fraud, deceit or misrepresentation in violation of D.R. 1-102(a)(4) of the Illinois Code of Professional Responsibility.

2. Whether the petitioner is denied due process upon the rigid application of a mathematically based sanction without consideration for the compelling mitigating circumstances presented by the petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

No.

IN RE

JACK M. LEVIN,

Attorney-Petitioner.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

Attorney-petitioner, JACK M. LEVIN ("petitioner"), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered April 4, 1984, by which that Court suspended petitioner from the practice of law in the State of Illinois for three years and until further order of the Court.

COURSE OF PROCEEDINGS BELOW

This cause arises from a six-count complaint filed on August 5, 1981, by the Administrator of the Attorney Registration and Disciplinary Commission against petitioner.

Each of the six counts of the complaint charged petitioner with neglect of legal matters entrusted to him in violation of D.R. 6-101(a)(3) of the Illinois Code of Professional Responsibility, as well as with conduct involving dishonesty, fraud, deceit or misrepresentation in violation of D.R. 1-102(a)(4). A hearing was conducted on January 14 and 15, 1982, at which time the Hearing Board, finding that the six counts of neglect, but not the misrepresentation, were proven, unanimously recommended that the petitioner be suspended from the

practice of law for a period of two years. (Appendix C, Report and Recommendation of Hearing Panel.)

Counsel for the Administrator filed exceptions with the Review Board, alleging that the Hearing Board had erred in finding that petitioner was not guilty of conduct involving misrepresentation in violation of D.R. 1-102(a)(4) of the Illinois Code of Professional Responsibility, and that disbarment was warranted. Petitioner filed exceptions to the Report of the Hearing Board with respect to the quantum of discipline recommended.

On March 17, 1983, the Review Board summarily affirmed the Hearing Board's recommendation of a two-year suspension. (Appendix D). The matter came before the Illinois Supreme Court on exceptions filed

by the Administrator to the finding that the misrepresentations alleged in Counts I, III and V were not proved and to the amount of discipline recommended upon exceptions filed by petitioner to the sanctions ordered by both Boards.

The Illinois Supreme Court, while accepting the Hearing and Review Boards' finding that the petitioner was not guilty of misrepresentation, fraud or deceit, nevertheless increased the recommended sanction from a two-year suspension to a suspension for three years and until further order of the Court, on the grounds that petitioner's conduct "went beyond mere neglect." (Appendix A, 101 Ill.2d 535, 463 N.E.2d 715 (1984.)*

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*The Illinois Supreme Court's order will be referred to herein as the "Suspension Order."

JURISDICTION

The Suspension Order of the Illinois Supreme Court was entered on April 4, 1984. A timely Petition for Rehearing was denied on June 4, 1984. This Petition for Writ of Certiorari was filed within ninety days after the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES:

Section 1.

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATE RULES INVOLVED

ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY:

> A lawyer shall not... neglect a matter entrusted to him. D.R. 6-101(a)(3)
>
> A lawyer shall not... engage in conduct involving dishonesty, fraud, deceit or misrepresentation. D.R. 1-102(a)(4)

ILLINOIS SUPREME COURT RULE 771 FOR THE ADMINISTRATION AND DISCIPLINE OF ATTORNEYS, PART B:

> Conduct of attorneys which violates the Code of Professional Responsibility contained in article VIII of these rules which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court. Discipline of attorneys may be by:
>
> (a) disbarment;
>
> (b) disbarment on consent;
>
> (c) suspension for a specified period and until further order of court;
>
> (d) suspension for a specified

period of time ;

(e) censure.

STATEMENT OF THE CASE

Background

Petitioner graduated from John Marshall School of Law in 1959. (Tr., 169) From the time he obtained his license in May of 1960 until he became a sole practitioner in 1973, petitioner practiced law in a number of reputable Chicago firms. During the period covered by the complaint, the petitioner was engaged in high-volume plaintiff's personal injury practice. (Tr., 171) As a sole practitioner, he was known to be an intense and highly motivated individual, to the point of being a workaholic. (Tr., 87) Handling hundreds of files annually, petitioner felt

compelled to work extremely long hours, often seven days a week. (Tr., 172-173) In fact, it was quite common for petitioner to try 25 to 30 cases per year to a verdict before a jury. (Tr., 171) Many of the cases that he handled were not only for relatively small amounts of money, but were also very difficult cases of contested, even questionable liability. (Tr., 84, 889) As one witness put it:

> "Jack takes the hardest kinds of cases with the most difficult liability problems in the personal injury field and tries to make something out of them....
>
> His reputation is of trying to turn the garbage into gold.
>
> Where most lawyers would just give up on them, he takes them and tries to do the best he can." (Tr., at 85)

There is no doubt then that petitioner's

practice involved the representation of persons who probably would not have had anybody to try their cases if petitioner had not.

Eventually, petitioner's excessive work habits began to have an adverse impact on both his children and his wife. (Tr., 174) Unhappy with her husband's workaholic tendencies and his inability to devote more time to personal matters, petitioner's wife filed for divorce in 1973 or 1974. (Tr., 173, 175) It was around this same time that petitioner's oldest daughter began to experience serious emotional problems, ultimately suffering a nervous breakdown on two different occasions. (Tr., 175, 199) The situation progressively deteriorated, culminating in petitioner's wife and daughters having to undergo

psychiatric treatment. (Tr., 174, 206) Unfortunately, the difficulties encountered by petitioner in his personal life, coupled with the enormous demands of a high volume practice ultimately led him to neglect a number of legal matters.

Realizing that he had over-extended himself, and admittedly impelled to a great extent by the threatened disintegration of his family, as well as by the incidents which precipitated a prior suspension from the practice of law, petitioner began to change his practice drastically sometime between 1973 and 1976. (Tr., 175-177, 192, 204, 206) Whereas, originally, his law practice was comprised of cases taken directly by the petitioner from the client at the outset of the claim, cases referred to him at some point during

pendency by other attorneys, and cases referred to him specifically for trial, respondent now began to make good faith attempts to accept only cases, on referral from other lawyers, that were getting close on the trial call. (Tr., 175-176) Today, ninety percent of petitioner's practice is made up of files that are within three or four months of trial. (Tr., 176)

Petitioner has also taken considerable measures to review his practice so that nothing like that which has been alleged in the complaint can happen again. (Tr., 177) First, he has taken steps to have a much better indexing of the cases. (Tr., 177) Second, he has advised all of his referring attorneys to handle all depositions except those of substantial

cases. (Tr., 177) Third, petitioner has drastically reduced the number of cases requiring clients to come to him initially. (Tr., 177) He opens no more than fifteen new files a year now, preferring instead to leave the client contact to his referring attorneys. (Tr., 177) Furthermore, in addition to making a special effort to return all phone calls, petitioner has reduced the number of hours he customarily worked on a weekly basis, making a special point to avoid the office on Saturdays altogether.

William Maddux, a trial attorney from the Chicago legal community, who has practiced law for 23 years and has known petitioner continuously on a professional basis for that same period of time, testified as to petitioner's honesty, integrity, good moral character, and

fitness to practice law. (Tr., 160) Mr. Maddux stated:

> "In my opinion and from my personal observations, Jack Levin is an able, competent trial lawyer., Not only able and competent, but a person you can believe.
>
> I never found him to make a statement that was deemed or found to be untrue. I can assure you his work is good." (Tr., at 161)

Furthermore, according to Mr. Maddux, who related he has had ample opportunity to observe petitioner's professional work over the years, petitioner served his clients well and loyally and to the best of his ability. (Tr., 161) This is significant in light of the fact that petitioner had a reputation in the Chicago legal community for handling very difficult cases. (Tr., 84) Yet, as Mr. Maddux noted, "I never saw anything other than able handling." (Tr., 161-162)

Notwithstanding the incidents of neglect in the instant case, Mr. Maddux testified he is still of the opinion that petitioner is competent to practice law. (Tr., 166)

The Suspension Order

The Illinois Supreme Court, after reviewing the findings of fact and the recommendations of the Hearing and Review Boards considered two issues: 1) whether the Hearing and Review Boards erred in not finding dishonesty or misrepresentation in petitioner's conduct, and 2) whether the two year suspension recommended by both the Hearing and Review Boards was appropriate.

In its opinion, the Court acknowledged the findings of the Hearing and Review Boards inasmuch as they found no evidence

of misrepresentation, fraud or deceit in violation of D.R. 1-102(a)(4). However, despite the concession that there was no violation of D.R. 1-102(a)(4) and the recognition that "we gave considerable deference to findings of fact by the Hearing Board," the Court chose to ignore the Boards' recommendations of a two-year suspension on the grounds that: (1) the petitioner's "blatant misstatements" went "beyond mere neglect" and (2) the petitioner had engaged in six instances of misconduct subsequent to a previous sanction. Specifically, the court stated that while the findings of the Hearing Board "are entitled to the same weight as any other fact finder" and are accorded "considerable deference" by the Supreme Court, the Court was "not required to

accept them when the Board's conclusion is not established by clear and convincing evidence." 101 Ill.2d at 539, 540.

Significantly, the Supreme Court rejected as against "clear and convincing evidence" only those findings of the Board relating to the petitioner's quantum of neglect. However, in imposing the increased sanction of a three-year suspension and "until further order" on the finding that petitioner's conduct involved "blatant misstatements," the Court sought to impose a sanction tantamount to disbarment and appropriate only in those circumstances where dishonesty, actual misrepresentation, fraud or deceit in violation of D.R. 1-102(a)(4) has been demonstrated by clear and convincing evidence. In re

March, 71 Ill.2d 382, 376 N.E.2d 213 (1978). Thus, the Illinois Supreme Court, on the same set of facts and with no additional finding of a D.R. 102(a)(4) violation as requested by the Administrator, deemed it proper to not only augment the period of suspension, but to considerably aggravate the harshness of the sanction by prohibiting reinstatement "until further order of the Court." 101 Ill.2d at 542.

In this context, it is important to note that the court expressly recognized that in order to safeguard the public and maintain the integrity of the legal profession, "it is important that there be uniformity in the sanctions afforded to different attorneys." 101 Ill.2d at 541, citing In re Clayter, 78 Ill.2d 276, 399 N.E.2d 1318 (1980). Nevertheless, in

distinguishing or ignoring those disciplinary cases in which it had ordered significantly lighter sanctions on facts substantially congruent with those material to the instant case, the Illinois Supreme Court inexplicably chose to disregard this standard. Distinguishing In re Chapman, 95 Ill.2d 484, 448 N.E.2d 852 (1983), solely on the basis of that respondent's alcoholism, the Court unfairly trivialized the compelling circumstances surrounding the petitioner's misconduct in this case and ignored the fact that the respondent in Chapman had a history of previous disciplinary sanctions and made repeated "prejudicial misstatements" to his client.

The Court maintained that its decision in the instant case was consistent with the discipline imposed in

In re Johnson, 93 Ill.2d 441, 444 N.E.2d 153 (1982) and In re Levinson, 71 Ill.2d 486, 376 N.E.2d 998 (1978), on the grounds that "the neglect found here includes a greater number of instances and for that reason alone, even without regard to the respondent's previous misconduct, calls for a longer suspension." 101 Ill.2d at 543. However, as petitioner in his Petition for Rehearing pointed out, while the sanctions in Johnson and Levinson apparently present mathematical consistency in terms of the period of supervision, i.e., six months suspension for each instance of neglect, in neither case did the court impose upon the respondent the added burden of his proving he is qualified to return to practice at the end of the suspension

period.

Clearly, in misconstruing Johnson and Levinson and failing to address or consider those cases cited in petitioner's brief in which repeated acts of neglect were accompanied by "blatant misstatements" and/or actual misrepresentation, In re Kink, 92 Ill.2d 293, 442 N.E.2d 206 (1982); In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977); In re Ahern, 23 Ill.2d 69, 177 N.E.2d 197 (1961), the Court sought to evade the plain impact of those decisions which impose substantially lighter sanctions then those dictated in the instant case.

Similarly, the Illinois Supreme Court's decision to rigidly apply a mathematically determined sanction based upon its interpretation of In re Johnson, supra, 444 N.E.2d at 153, and In re

Levinson, supra, 376 N.E.2d at 998, ignores the unique mitigating factors present in the instant case. As the Hearing Board noted:

> "No doubt exists in the minds of the Panel that during the heart of the period involved the Respondent was embroiled in serious, substantial marital and family problems... [and] It is undoubted that the personal problems of the Respondent may be part of the reason for his inaction on the cases" (Appendix C)

Similarly, the Hearing Board stated:

> "The Panel implies no criticism of the Respondent for accepting cases of such adverse liability or apparently limited recovery. In fact, respondent is to be commended for accepting such difficult cases for clients who would not ordinarily have had a day in court." (Appendix C)

Evidence of petitioner's honesty and good reputation in the community, his lack of corrupt or dishonest motives and his willingness to cooperate with the

Commission was not addressed or considered by the Illinois Supreme Court in its opinion. While noting that the petitioner had taken on "a high volume, personal injury trial practice" involving many difficult cases "of dubious liability and small sums of money," the Illinois Supreme Court failed to take into account the Hearing Board's finding that the petitioner's deviation from required professional standards was mitigated in part by the high pressure nature of his practice and the serious professional problems resulting therefrom. 101 Ill.2d at 537. The Court further chose to discount the evidence that petitioner's continuous good faith efforts to substantially change the nature of his practice presented a mitigating factor dictating a lighter

sanction, regardless of the point in time when the major change occurred. The Court's justification for the increased sanction clearly ignored the compelling circumstances surrounding the petitioner's misconduct and rested solely on evidence of the petitioner's earlier discipline, the number of instances of neglect and the "irreparable prejudice to petitioner's clients - factors previously weighed and taken into consideration by the Hearing and Review Boards in their recommendation to the Illinois Supreme Court of a two-year suspension.

The unwarranted and harsh sanction imposed by the Court without consideration for sanctions imposed in cases substantially similar to the case at bar or the mitigating factors

present in the instant case, thereby resulted in an abrogation of petitioner's rights under the equal protection and due process clauses of the Fourteenth Amendment.

PETITIONER TIMELY RAISED HIS CLAIM THAT THE COURT'S HARSH AND UNPREDICTABLE SANCTION VIOLATED EQUAL PROTECTION.

Petitioner first raised his constitutional objection to the sanctions imposed by the Illinois Supreme Court in his Petition for Rehearing in which he asserted that the sanction was the effective equivalent to disbarment and was constitutionally inconsistent with sanctions imposed on other attorneys in similar cases. The Petitioner concluded that:

> These inconsistencies... raise grave constitutional issues of deprivation of due process and equal protection under the law. (Petition for Rehearing, pg. 3)

Petitioner's objection to the Court's sanction in his Petition for Rehearing was timely in that the court's increased sanction was both unexpected and unpredictable in light of the pattern of precedent set by that Court and the recommendations of imposed by the Hearing and Review Boards. Both the Hearing Board and the Review Board recommended a two-year suspension on the grounds that petitioner's conduct did not rise to the level of dishonesty, misrepresentation, fraud or deceit necessary for violation of D.R. 1-102(a)(4). Even upon a finding by the Illinois Supreme Court that petitioner's conduct went "beyond mere neglect," the sanctions previously imposed in cases involving either neglect or misrepresentation have not imposed the

added burden on the respondent to prove after a period of suspension that he is qualified to resume his practice. In re Johnson, 93 Ill.2d 441, 444 N.E.2d 153 (1982); In re Levinson, 71 Ill.2d 486, 376 N.E.2d 998 (1978).

Petitioner concedes that the general rule is that a "constitutional question is urged too late, if put forward for the first time upon petition for rehearing." Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 366 (1932). It is clear, however, that the instant case falls into the class of decisions in which this Court will review a state supreme court's unpredictable foreclosure of a party's constitutional right. Specifically, Justice Cardozo in Great Northern spoke of the exception into which the petitioner falls:

> The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered or decided (citations omitted), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right. 287 U.S. at 367. (emphasis added)

Thus, where "the objections of the petitioner could not [have been] made in advance of the event," the United States Supreme Court will assert jurisdiction over the matter in order to prevent an unjustifiable foreclosure of a constitutional claim arising only upon the rendition of a decision by a state supreme court. Great Northern, supra, 287 U.S. at 367; Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 n. 9 (1980); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678 (1930).

In the instant case, petitioner was confronted with an unexpected and unwarranted sanction which departed not only from the recommendations of the Hearing and Review Boards, but from the precedent set by previous Illinois Supreme Court decisions. Petitioner cannot reasonably be bound to anticipate the unconstitutional departure from precedent in order to invoke federal protection in advance. The federal issue in this case arose from the unanticipated ruling of the state court, and petitioner's presentation of this issue in his Petition for Rehearing "was timely since it was raised at the first opportunity." Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678 (1930).

ARGUMENT

Introduction

This Court has held that it will review a state court order denying an attorney's right to practice law where the attorney makes a substantial allegation that the order violates the due process or equal protection clause of the Fourteenth Amendment. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Theard v. United States, 354 U.S. 278 (1957). Implicit in this holding is this Court's recognition that "without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes... the right of an individual... to engage in any of the common occupations of life..." Board of

Regents v. Roth, 408 U.S. 564, 572 (1972), quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1922).

More specifically, upon earning the privilege to practice law "an attorney's calling or profession is his property within the literal sense and meaning of the Constitution." Ex parte Wall, 107 U.S. 265, 289 (1883). In repeatedly acknowledging that after an attorney has earned his license he has gained--in terms of "liberty"--the right to practice law, this Court has held that the state's exercise of its disciplinary powers may threaten an attorney with a "significant deprivation of liberty" as well as subject him to a risk of "grave stigma." Santosky v. Kramer, 455 U.S. 745 (1982); Wisconsin v. Contantineau, 400 U.S. 433 (1971). As Chief Justice Marshall in

Ex parte Burr, 22 U.S. 529 (1884), stated:

> ...the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. 22 U.S. at 529.

In accord with this Court's holdings, the Illinois Supreme Court has held that although the dual purpose of the disciplinary system is to safeguard the public and maintain the integrity of the legal profession, In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282 (1980), the duty of the courts to protect the public from the impositions and improper practices of attorneys must not be exercised in a despotic manner and without legal discretion. In re Fisher, 15 Ill.2d 139, 153 N.E.2d 832 (1958).

In Fisher, the Illinois Supreme Court citing In re Donaghy, 402 Ill. 120, 123, 83 N.E.2d 560, 562 (1949), noted:

> The legal calling is a time-honored profession and the Courts owe a duty to protect the public from impositions and improper practices. This duty has repeatedly been declared by this court. (citations omitted) Such duty, and the manner in which it is exercised, must not be despotic, but the charges must be sustained by clear and convincing proof and the misconduct must be shown to have been fraudulent and the result of improper motives, and the proof must show intent. (citation omitted) The courts must not exercise their supervisory control in an arbitrary manner, but must show a legal discretion in the exercise thereof. 153 N.E.2d at 840.

Similarly, the court in Fisher expressed its sentiment on the subject of a lengthy suspension stating:

> The disbarment of an attorney is the destruction of his professional life, his character, and his livelihood. (citations omitted) The court should, therefore, disbar

> in moderation. Likewise, the same considerations obtain in the application of a three-year suspension rule. A removal of an attorney from practice for a period of years entails the complete loss of a clientele with its consequent uphill road of patient waiting to again re-establish himself in the eyes of the public, in the good graces of the courts and his fellow lawyers. In the meantime his income and livelihood have ceased to exist. 153 N.E.2d at 840-841.

In light of these considerations, a state may not exclude a person from the practice of law or any other occupation in a manner or for reasons that contravene the due process or equal protection clauses of the Fourteenth Amendment. Due process and equal protection require that the state action have a "rational connection' with the attorney's fitness or capacity to practice law. Schware, supra, 353 U.S. at 238. Specifically, under the equal

protection clause a classification must be reasonable and not arbitrary or capricious, and rest upon some ground of difference having a fair and substantial relation to the object of legislation such that all persons similarly circumstanced are treated alike. McGowan v. Maryland, 366 U.S. 420 (1961). Similarly, due process requires that the exercise of power resulting in the deprivation or partial destruction of an individual's professional life rest on a "reasonable basis" and bear some "rational relation" to that individual's fitness to pursue his profession. Barsky v. Board of Regents of New York, 347 U.S. 442 (1953). In either context, where the evidence does not "rationally support" the grounds for denying the right to practice law, the state's action

may be classified as an arbitrary and discriminatory "denial of due process and equal protection of the laws." Konigsberg, supra, 353 U.S. at 262.

In the instant case, the petitioner contends he has been denied due process and equal protection of the law based upon the following:

1) the imposition of a sanction equivalent to disbarment which is:

a) inconsistent with the sanctions imposed on attorneys similarly situated, and

b) in complete disregard of the findings of fact and recommendations of the Hearing and Review Boards without clear and convincing evidence of dishonesty, fraud, deceit or misrepresentation in violation of D.R. 1-102(a)(4), and

2) upon the rigid application of a mathematically based sanction without consideration for the compelling mitigating circumstances presented by the petitioner.

The basis of the Illinois Supreme Court's decision as articulated by that court, rested on its desire to "safeguard the public and maintain the integrity of the legal profession." 101 Ill.2d at 539. However, this objective is not secured by the arbitrary and discriminatory sanction imposed on the petitioner. No rational basis exists for the difference in punishment and in fact, such a disparity effectively inhibits the communication to the public and the profession the standard of conduct expected of persons licensed to practice law in Illinois. As a result of the Court's arbitrary failure to consider any mitigating circumstances, this case results in the effective disbarment of an attorney who has

changed the nature of his practice to prevent further instances of neglect and who was commended by the Hearing Board for his willingness to represent clients who would not ordinarily have had a day in court. (Appendix C). Conversely, uniformity of sanctions after a consideration of mitigating factors will secure the rights of due process and equal protection under the laws as guaranteed by the Fourteenth Amendment.

I. THE PETITIONER IS DENIED DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS AS A RESULT OF THE ILLINOIS SUPREME COURT'S ARBITRARY IMPOSITION OF A SANCTION INCONSISTENT WITH DISCIPLINE IMPOSED ON ATTORNEYS CHARGED WTH SIMILAR MISCONDUCT AND IN DISREGARD OF THE HEARING AND REVIEW BOARDS' FINDINGS AND RECOMMENDATIONS WITHOUT CLEAR AND CONVINCING EVIDENCE OF DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION IN VIOLATION OF D.R. 1-102(a)(4).

A. The Illinois Supreme Court's Sanction Is An Arbitrary And Discriminatory Deviation From The Sanctions Imposed Upon Those Attorneys Charged With Similar Misconduct.

The deprivation of a lawyers's license "is a punishment or penalty" imposed on the lawyer "by way of adversary proceedings of a quasi-criminal nature." In re Ruffalo, 390 U.S. 544, 550-551 (1968). Further characterizations in Konigsberg, supra, 353 U.S. at 252, and Ruffalo, supra, 390 U.S. at 544, concerning the attorney's interest in his license, and the nature of the proceedings depriving him of it, suggest that standards more exacting than those governing ordinary civil cases must be applied to disciplinary proceedings. In particular, this court's decisions in Ruffalo, supra, and Spevack v. Klein, 385

U.S. 511, 515 (1967), where the requirements of adequate notice of charges and the privilege against self-incrimination were extended to disbarment proceedings, appear to recognize that because of their similarity with conventional criminal sanctions, disciplinary actions against attorneys entitle the attorney to many of the constitutional protections extended to those accused of criminal violations. One such constitutional protection currently being recognized is the need for uniformity tempered by mitigating factors in sentencing.

Significantly, the Illinois Supreme Court in its opinion in the instant case acknowledges that "in order to safeguard the public and maintain the integrity of the legal profession... it is important

that there be uniformity in the sanctions afforded to different attorneys." 101 Ill.2d at 541, citing In re Clayter, 78 Ill.2d 276, 283, 399 N.E.2d 1318 (1980). As the court stated in In re Saladino, 71 Ill.2d 263, 375 N.E. 2d 102 (1978):

> Although appropriate facts may always be considered in mitigation, predictability and fairness require a degree of consistency in the selection of sanctions for similar types of misconduct. That degree of consistency can only be achieved if sanctions are based on articulated standards of conduct. These standards must be "derived from the underlying purposes of our disciplinary process, which are to safeguard the public, maintain the integrity of the profession, and protect the administration of justice from reproach. 375 N.E.2d at 106-107.

Thus, "where facts are strikingly similar to those in another case, a degree of uniformity in the discipline sought should be imposed." In re Clayter,

supra, 399 N.E.2d at 1321.

Despite its recognition of the need for uniformity of sanctions, the Illinois Supreme Court failed to consider or address those cases cited in the petitioner's brief where the Court had ordered a lesser sanction as the appropriate discipline on facts substantially congruent with those material to this case. In re Kink, 92 Ill.2d 293, 442 N.E.2d 206 (1982); In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977); In re Ahern, 23 Ill.2d 69, 177 N.E.2d 197 (1961).

As early as 1961, the court ordered censure for an attorney charged with five counts of neglect. In re Ahern, 23 Ill.2d 69, 177 N.E.2d 197 (1961). In that case, each count contained the charge that Mr. Ahern received payment

for services, but either did not render any services or the services rendered by him were simply not commensurate with the amount received. While it was apparent in the matter involving all five counts that respond had failed to perform the services for which he had been retained, the court held that censure rather than suspension constituted sufficient punishment. There, as in the instant case, respondent had personal problems involving the illness of a daughter and his wife. In reaching its decision, the Court took into consideration these extenuating circumstances noting that respondent's personal problems and his subsequent difficulties adjusting to his personal life may have explained a good part of his misconduct. Moreover, although Mr. Ahern's misconduct clearly

involved an error in judgment, it was not shown to have resulted from corrupt motives.

In 1977, the Illinois Supreme Court held that a one-year suspension from the practice of law was the appropriate sanction for an attorney who showed a "pattern of consistent neglect." In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977). Respondent's neglect in that case was based on a series of agreements to represent clients, acceptance of fees or money for costs, neglect in peforming and completing legal services, and frequent inaccessibility to a client. Although it was clear that Mr. Taylor acted with consistent neglect and that disciplinary action was warranted, the Court, nonetheless, concluded that a three-year suspension would not serve the

interest of the public and the legal profession given respondent's lack of overtly dishonest acts and corrupt motives.

In a more recent decision involving facts similar to those at bar, censure was again held to be the appropriate sanction. In re Kink, 92 Ill.2d 293, 442 N.E.2d 206 (1982). Respondent in Kink manifested a lack of care in handling the estates of three separate clients, several instances of which extended over a period of years and operated to the irreparable prejudice of his clients. The record indicated that the respondent failed to close the estates, failed to file certain documents, failed to pay taxes and misrepresented the status of the case to clients. Respondent was less than candid with at least one client, and

he remained inaccessible despite his clients' attempts to contact him.

In reaching its decision, the Court in Kink took into consideration a number of extenuating circumstances which, in its opinion, tended to mitigate or explain respondent's misconduct. Among other things, the Court noted that respondent's conduct was apparently not prompted by dishonest motives and that he had been cooperative and candid during the proceedings, two factors which have been held to be significant in determining the appropriate punishment. In re Clayter, 78 Ill.2d 276, 399 N.E.2d 1318 (1980); In re Damisch, 38 Ill.2d 195, 230 N.E.2d 254 (1967). Consideration was also given to the testimony of witnesses as to respondent's excellent reputation in the community.

The Court further observed that although the respondent had been negligent and dilatory in representing his clients' interests, he had in fact--similar to the instant case--rendered some services on their behalf. The Court, finding the circumstances analogous to those in Ahern, concluded once again that neither the best interests of the public nor those of the legal profession would be served by suspending the respondent.

The facts in In re Chapman, 95 Ill.2d 484, 448 N.E.2d 852 (1983), which the Illinois Supreme Court chose to distinguish solely on the basis of that respondent's alcoholism, are analogous to the facts material to the instant case. In Chapman, the Court held that the neglect of legal matters coupled with misrepresentation of the status of the

case to the client, warranted a two-year probationary suspension, notwithstanding respondent's history of previous discipline and his failure to cooperate in the disciplinary proceeding. It is worthwhile noting that the misconduct in Chapman commenced less than a year from the conclusion of an earlier disciplinary proceeding. In fact, respondent had already been disciplined for professional misconduct on two prior occasions. In one instance, he was reprimanded. In 1978, he was suspended for three months for neglecting clients' affairs, the same misconduct with which he was subsequently charged in 1983.

Petitioner's misconduct in the instant case differs little from the cases cited above in which the Illinois Supreme Court found significantly lighter

sanctions were warranted. All involved a pattern of consistent neglect which amounted to the non-performance of legal services owed to a client coupled with "misstatements" and/or actual misrepresentations, and in Ahern and Chapman, a history of previous disciplinary sanctions. Clearly, the Illinois Supreme Court's decision to ignore the impact of these cases results in a gross deviation from the established sanctions for petitioner's misconduct to the prejudice of the petitioner's constitutional rights and the legal profession as a whole.

B. The Illinois Supreme Court Ignored The Findings And Recommendations Of The Hearing and Review Boards Without Clear and Convincing Evidence of Dishonesty, Fraud, Deceit Or Misrepresentation In Violation of D.R. 1-102(a)(4).

Paralleling the recognized need for uniformity in the imposition of disciplinary sanctions, the findings of the Hearing and Review Boards are given "great deference" by the Illinois Supreme Court in its reviewing capacity, as these entities are best situated to "making factual findings in contested matters and developing uniformity in our disciplinary system." In re Cohen, 83 Ill.2d 521, 416 N.E.2d 256 (1981). As the Court in Cohen noted:

> While this court has the ultimate responsibility to impose and enforce attorney discipline... the findings and recommendations of the Inquiry, Hearing and Review Boards are entitled to and receive our serious consideration. These boards, with the exception of the Review Board, see and hear the witnesses and play important roles in screening and hearing cases, making factual findings in contested matters and developing uniformity in our disciplinary system. 416 N.E.2d at

258.

Similarly, the Court in In re Kink, supra, 442 N.E.2d at 209, quoting In re Hopper, 85 Ill.2d 318, 423 N.E.2d 900 (1981), noted:

> Where the question is credibility of witnesses, resolution of conflicting testimony, or other such fact-finding judgments, the hearing panel should be afforded a good deal of deference.

Moreover, "where the findings of those boards are based on uncontradicted and clear evidence they will be adopted." In re Wigoda, 77 Ill.2d 155, 395 N.E.2d 571 (1979).

In its opinion in the instant case, the Illinois Supreme Court expressly acknowledged that "a finding by the Hearing Board of the Disciplinary Commission is entitled to the same

weight as that of any other factfinder." 101 Ill.2d at 539 citing In re Kink, 92 Ill.2d 293, 301, 442 N.E.2d 206 (1982), and In re Feldman, 89 Ill.2d 7, 10, 431 N.E.2d 388 (1982). The Court further conceded that "we give considerable deference to findings of fact by the Hearing Board." 101 Ill.2d at 539.

Nevertheless, the Court chose to ignore the findings of the Hearing and Review Boards--without any further findings of fact beyond those found by the Board--on the grounds that it was "not required to accept [the Board's findings] when the Board's conclusion is not established by clear and convincing evidence." 101 Ill.2d at 540. Conceding that "although the Board found that there was no misrepresentation here," the Court concluded that petitioner's conduct was

in the ambiguous realm of "beyond mere neglect" without rising to the level of dishonesty, misrepresentation, fraud or deceit in violation of D.R. 1-102(a)(4).

This Court has determined that there is a denial of due process and equal protection where an individual is denied the right to practice law where no evidence in the record rationally supports a finding of doubt about the attorney's fitness or capacity to practice law. Konigsberg, supra, 353 U.S. at 252. In the instant case, petitioner is faced with a sanction equivalent to disbarment. While the petitioner in this case does not concede that the original two-year suspension was correct, he maintains that in comparison with the discipline meted out by the Illinois Supreme Court, the sanctions of

the Hearing and Review Boards are more consistent with the degree of his misconduct. Clearly, disbarment is an extreme measure appropriate only in those limited circumstances where intentional fraud, deceit, misrepresentation or dishonest motive is shown by clear and convincing evidence. In re March, 71 Ill.2d 382, 376 N.E.2d 213 (1978). Neither the Hearing and Review Boards nor the Illinois Supreme Court found evidence of such egregious conduct as to warrant the imposition of such a sanction. In this case, the Court's interest in protecting the public and the legal profession from improper conduct of the petitioner will not be served by the suspension for three years and "until further order." Not only does the

disparity in sanctions prevent the uniform application of the law, but the Court's failure to give credence to the findings of the Hearing Board effectively inhibits the uniform development of sanctions by that body best able to judge the credibility of witnesses and evidence.

II.

THE ILLINOIS SUPREME COURT'S MECHANICAL APPLICATION OF A MATHEMATICALLY DETERMINED SANCTION IGNORED THE COMPELLING MITIGATING CIRCUMSTANCES SURROUNDING THE PETITIONER'S MISCONDUCT.

It is well-settled under Illinois law that while uniformity of sanctions is a fundamental consideration, In re Clayter, 78 Ill.2d 276, 283, 399 N.E.2d 1318 (1980); In re Saladino, 71 Ill.2d 263, 375 N.E.2d 102 (1978), the determination of appropriate discipline must also involve and often times turn upon, the

unique factors of mitigation present in each case. In re McLennon, 93 Ill.2d 215, 443 N.E.2d 553 (1982); In re Hopper, 85 Ill.2d 318, 423 N.E.2d 900 (1981). The rule as established by the Illinois Supreme Court parallels that enunciated by this Court for consideration in criminal sentencing. As this Court has stated: "[T]he sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." Williams v. Oklahoma, 358 U.S. 576, 585 (1959). Accord, United States v. Jonnson, 507 F.2d 826, 830 (7th Cir. 1974), cert. denied, 421 U.S. 949 (1975). Underlying this decision is the rationale that the mechanical application of a sentence violates the equal protection and due process clauses of the

Fourteenth Amendment in that it results in equal sentences for those defendants who as a result of individual mitigating circumstances may not be similarly situated.

In the instant case, the Illinois Supreme Court clearly ignored all evidence of mitigating circumstances found by the Hearing and Review Boards, and under the guise of uniformity, sought to impose a rigid mechanical sanction derived from its erroneous interpretation of those sanctions imposed in In re Johnson, 93 Ill.2d 441, 444 N.E.2d 153 (1982) and In re Levinson, 71 Ill.2d 486, 376 N.E.2d 998 (1978). The Court maintained that its decision in the instant case was consistent with the discipline imposed in Johnson and Levinson cn the grounds that "the neglect

found here includes a greater number of instances and for that reason alone, even without regard to the respondent's previous misconduct, calls for a longer suspension." 101 Ill.2d at 543.

Notwithstanding the Illinois Supreme Court's contention that their decision "is consistent" with Johnson and Levinson, the Court's imposition of a three-year suspension and "until further order" sanction--a sanction effectively tantamount to disbarment--is, in fact, a gross deviation from the discipline imposed in those two cases and in previous decisions. Neither Johnson nor Levinson imply that each instance of neglect should be punished with six months suspension. Clearly, neither Johnson nor Levinson advise "three years suspension until further order" as the

appropriate sanction for misconduct similar to that in the instant case.

The Court, in the imposition of this harsh and unwarranted sanction solely on the basis of "the number of instances of neglect," clearly sought to avoid the plain impact of those decisions in similar cases where significantly lighter sanctions were imposed despite the evidence of a "consistent pattern of neglect" and misrepresentations to clients. In re Kink, supra, 92 Ill.2d 293, 442 N.E.2d 206 (1982); In re Taylor, supra, 66 Ill.2d 567, 363 N.E.2d 845 (1977); In re Ahern, supra, 23 Ill.2d 69, 177 N.E.2d 197 (1961). The effective disbarment imposed in this case not only grossly deviated from sanctions imposed in similar cases--to the prejudice of the petitioner's constitutional rights--but

clearly failed to protect the public or the integrity of the judicial process or advance the standards of ethics of the legal profession.

Moreover, the Court's failure to consider the mitigating circumstances surrounding the petitioner's misconduct in the instant case violated the petitioner's rights of due process and equal protection under the laws. The petitioner offered the Illinois Supreme Court two reasons for the non-performance of his professional duties, vis., a high volume intensely demanding practice and serious personal problems. The record demonstrates the Hearing Board's recognition that "the personal problems of the Respondent may be part of the reason for his inaction on the cases" and that "Respondent is to be commended for

accepting such difficult cases for clients who would not ordinarily have had a day in court." (Appendix C) The record further illustrates that the petitioner has a reputation for honesty in the legal community and was cooperative and candid with the Commission.

The circumstances surrounding the petitioner's conduct were sufficiently compelling to dictate a lesser sanction than that imposed by the Court. In addition, the Court's application of a mathematically based sanction without consideration of the mitigating circumstances present in the instant case resulted in a complete abrogation of the petitioner's rights of due process and equal protection as guaranteed by the Fourteenth Amendment.

CONCLUSION

For the reasons set out above, petitioner respectfully submits that this Petition for Writ of Certiorari should be granted and that the decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

WILLIAM J. HARTE

WILLIAM J. HARTE
WILLIAM J. HARTE, LTD.
111 West Washington Street
Suite 2025
Chicago, Illinois 60602
(312) 726-5015